No. 665 40

In the
Supreme Court of the United States

October Term [redacted] 1961

DAVID D. BECK, *Petitioner,*

vs.

STATE OF WASHINGTON, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

TABLE OF CASES

STATUTES

TEXTBOOKS

CONSTITUTIONS

COURT RULES

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OPINIONS BELOW

The opinion of the Wasbington State Supreme Court is reported at 155 Wash. Dec. 565, 349 P.(2d) 387 (App. p. 1 of petition). The order of the Washington State Supreme Court adhereing to the above opinion is reported at 156 Wash. Dec. 334, 353 P.(2d) 429 (App. p. 64 of petition).

JURISDICTION

Rule 23 (1) (f) of the Revised Rules of the Supreme Court of the United States requires that the petitioner (for certiorari) set out in the statement of the case

> "... the way in which they [the federal questions] were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of the court's

charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

The petitioner in this cause has not, and it is submitted that he cannot, comply with the above quoted provision of the rules of this court. The decision of the state court was based entirely upon the laws of the state of Washington and no Federal question was ruled upon by the state court nor necessary to its decision.

QUESTIONS PRESENTED

Does an affirmance of a criminal conviction by an equally divided state appellate court raise a Federal question under the Fourteenth Amendment to the Federal Constitution?

Does the fact that the Washington State Supreme Court is unable to agree on the meaning of Washington statutes regulating grand jury procedure raise a Federal question under the Fourteenth Amendment to the Federal Constitution?

Does a determination by a state court under state law that neither a continuance nor a change of venue in a particular criminal case is necessary to ensure that the defendant in that case gets a fair trial raise a Federal question under the Fourteenth Amendment to the Federal Constitution?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 25 of the Washington State Constitution provides as follows:

> "Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, as shall be prescribed by law."

Article IV, Section 2 of the Washington State Constitution provides as follows:

> "The supreme court shall consist of five judges, *a majority of whom shall be necessary* to form a quorum, and *pronounce a decision.* The said court shall always be open for the transaction of business except on nonjudicial days. *In the determination of causes all decisions of the court shall be given in writing and the grounds of the decision shall be stated.* The legislature may increase the number of judges of the supreme court from time to time and may provide for separate departments of said court." (Emphasis supplied)

Section 2.04.070 of the Revised Code of Washington provides as follows:

> "The supreme court, from and after February 26, 1909, shall consist of nine judges."

Section 10.28.030 of the Revised Code of Washington provides as follows:

> "Challenges to individual grand jurors may be made by such person [in custody or held to answer for an offense] for reason of want of qualification to sit as such juror; and when, in the opinion of the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice."

Section 10.28.130 of the Revised Code of Washington provides as follows:

> "If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors, who may thereupon investigate the same, if a majority so order."

Section 10.25.070 of the Revised Code of Washington provides as follows:

> "The defendant may show to the court, by affidavit, that he believes he cannot receive a fair trial in the county where the action is pending, owing to the prejudice of the judge, or to the excitement or prejudice against the defendant in the county or some part thereof, and may thereupon demand to be tried in another county. The application shall not be granted on the ground of excitement or prejudice other than prejudice of the judge, unless the affidavit of the defendant be supported by other evidence, nor in any case unless the judge is satisfied the ground upon which the application is made does exist."

Section 10.46.080 of the Revised Code of Washington provides as follows:

> "A continuance may be granted in any case on the ground of the absence of evidence on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually

given on the trial or offered and overruled as improper the continuance shall not be granted."

STATEMENT OF THE CASE

Respondent will adopt petitioner's mode of reference to the record explained at page 11 of petition. This case concerns a simple case of grand larceny by embezzlement tried in a state court. Petitioner was indicted for the offense by a grand jury on July 12, 1957 (Tr. 1) in King County, Washington.

Grand juries are quite rare in the state of Washington, most criminal actions being commenced by information filed by the prosecuting attorney. As was pointed out in the state appellate proceedings in this case, "During the forty years preceding the calling of this grand jury, there had been only seven grand jury sessions in King County." *State v. Beck*, 155 Wash. Dec. 565, footnote on page 615 (App. p. 51 of petition). As a consequence, the decisional law in regard to grand jury procedure is not well settled in the State of Washington.

During the time when the grand jury met, the petitioner was also under investigation by a Congressional committee. These circumstances together with the prominence of the petitioner caused a considerable amount of publicity to attend the above proceedings. In impaneling the grand jury, no affirmative determination was made as to whether the individual jurors were impartial and unbiased, although at least two of the prospective members of the grand jury panel were excused for prejudice. *State v. Beck*, 155 Wash. Dec. 565, footnote at page 604 (App. p. 50 of petition).

The subsequent proceedings are well described by excerpts from the publication of the state appellate court in this case:

"The indictment was returned by the grand jury on July 12, 1957. The trial began five months, lacking ten days (December 2, 1957) later. The trial had originally been set for October 28, 1957, but was continued for more than a month on the representation that additional time was necessary for the appellant [petitioner] to prepare his defense." *State v. Beck,* 155 Wash. Dec. 565, 575 (App. p. 11 of petition).

"The trial itself, divorced from the prominence of the defendant, presents a very simple factual issue.

"The state's evidence showed that the defendant had possession of a 1952 Cadillac automobile, belonging to the Western Conference of Teamsters; that he authorized its sale; that it was sold for nineteen hundred dollars, and the proceeds of the sale were deposited in one of his personal accounts over which he had exclusive control; that the Western Conference of Teamsters never received any part of the nineteen hundred dollars.

"To meet this evidence in support of the charge that he did '. . . . wilfully, unlawfully and feloniously secrete, withhold or appropriate the said $1,900 to his own use with intent to deprive and defraud the owner thereof;' there was testimony that the defendant thought the car was sold while he was out of the city; that when he returned and found that the car had been sold and the purchase price had been deposited in his account, he delivered nineteen hundred dollars to a bookkeeper and

told him to apply it to the account of either the Western Conference of Teamsters or the Joint Council of Teamsters, whichever owned the car. It was patently a defense that could be contrived to meet the exigencies of the case.

"The state's case was clear and unchallenged. The basic issue for the determination of the jury was whether or not it believed the explanation presented by the defense. The verdict of guilty was the jury's answer to that issue." *State v. Beck*, 155 Wash. Dec. 565 (App. p. 1 of petition).

Petitioner was sentenced and thereafter exhausted his state appellate remedies in the manner provided by law.

On February 3, 1960, the Washington State Supreme Court filed its per curiam opinion which reads as follows:

"PER CURIAM.—One of the judges of this court disqualified himself from participating in the decision of this case. The eight remaining judges, after numerous conferences, are equally divided in their decision for the reasons appearing in the opinions filed.

"There being no majority for affirmance or reversal, the judgment of the trial court stands affirmed.

"It is so ordered."

On rehearing, the Washington State Supreme Court filed an order on June 14, 1960, in which a majority adhered to the per curiam opinion set out above. *State v. Beck*, 156 Wash. Dec. 334 (App. p. 64 of petition).

As indicated by the per curiam opinion above, the

judges of the Washington State Supreme Court there set out the reasons why they were unable to agree on the merits. Since no more than four judges of the Washington Supreme Court signed any of the opinions giving the reasons why the court could not agree, those reasons are of no significance whatsoever as far as the decisional law of the state of Washington is concerned. Those reasons are significant, however, in that the only point of disagreement indicated therein is as to whether the laws and constitution of the state of Washington require that grand juries be impartial and unbiased. On the questions of continuance and change of venue and affirmance by a divided court there is no disagreement indicated whatsoever.

Petitioner now seeks to make this court a supervisory agency for criminal proceedings in the courts of the state of Washington.

ARGUMENT

The issues sought to be raised in the instant case are entirely within the purview of state law, and no Federal question is presented. It is a well-settled rule that the United States Supreme Court will not review a decision of a state court that is based upon an adequate state ground, even though it also could have been decided on a Federal ground. *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.ed. 398 (1944); *Dixon v. Duffy,* 344 U.S. 143, 73 S.Ct. 193, 97 L.ed 476 (1952); *Honeyman v. Hanan,* 300 U.S. 14, 57 S.Ct. 350, 81 L.ed. 476 (1936).

In his petition at pages 4 through 7, petitioner has

made certain assertions that the Washington State Supreme Court has decided certain things in regard to the Fourteenth Amendment to the United States Constitution and in regard to grand jury proceedings under Washington state law. The only decision rendered by the Washington State Supreme Court in the instant case is that the conviction of petitioner is affirmed because the court is equally divided on the merits. Certain reasons are set out following that per curiam opinion as to why the Washington court is equally divided. However, as pointed out by petitioner at pages 41 and 42 of petition, under the Washington State Constitution less than five judges in an *en banc* hearing cannot pronounce a decision. Therefore, since the reasons for the Washington court being equally divided are signed by no more than four judges each, those reasons are not a decision of that court.

Furthermore, the reasons set out for the division of the court do not in any way involve the Fourteenth Amendment to the United States Constitution, nor is the Fourteenth Amendment necessary to the reasons given. Those reasons are concerned solely with state law, as explained below.

Affirmance of a Criminal Conviction by an Equally Divided State Court

There is no Federal Constitutional prohibition against affirmance of a criminal case by an equally divided court. *Yancy v. U.S.*, 362 U.S. 389, 80 S.Ct. 811, 4 L.ed. (2d) 864 (1960); *Lott v. Pittman*, 243 U.S. 588, 37 S.Ct. 473, 61 L.ed. 915 (1916). It has always been the rule in the state of Washington that the lower court

will be affirmed when the supreme court is equally divided for affirmance or reversal. See *Peterson v. City of Tacoma,* 139 Wash. 313, 246 Pac. 944 (1926); *State v. Alfred,* 145 Wash. 696, 260 Pac. 1073 (1927); *Clise v. Carroll,* 163 Wash. 704, 300 Pac. 1047 (1931); *Edwards v. Carroll,* 163 Wash. 704, 300 Pac. 1048 (1931); *Bloss v. Equitable Life Assurance Society,* 176 Wash. 1, 33 P.(2d) 375 (1934); *Peoples Bank and Trust Company v. Romano Engineering Corporation,* 188 Wash. 290, 62 P.(2d) 445 (1936); *Investment and Securities Company v. The American Bank of Spokane,* 196 Wash. 347, 82 P.(2d) 857 (1938); *Serra v. The National Bank of Commerce,* 27 Wn.(2d) 277, 178 P.(2d) 303 (1947); *State ex rel. Taxpayers of Pierce County v. Remann,* 29 Wn.(2d) 843, 190 P.(2d) 95 (1948); *Croton Chemical Corporation v. Birkenwald, Inc.,* 49 Wn.(2d) 876, 307 P.(2d) 881 (1957); and *Best v. Dakin,* 52 Wn.(2d) 517, 326 P.(2d) 1009 (1958).

This rule has always been uniformly applied in Washington and there is no reason under the equal protection clause of the United States Constitution why the rule should be deviated from in this case. The rule is one of universal acceptance. See 5 C.J.S. 252, § 1844, 3 Am. Jur. 671, § 1160, and cases collected therein. A substantially identical situation obtained in *State ex rel. Hampton v. McClung,* 47 Fla. 224, 37 So. 51 (1904), wherein the court explained the reasons why the rule applies even where there is a Constitutional requirement that a majority of the court is necessary to pronounce a decision.

Petitioner complains that the Washington court did

not give the reasons for its decision as required by Article IV, § 2 of the Washington Constitution. It has never been decided whether that provision of the Washington Constitution is directory or mandatory. Assuming *arguendo* that it is mandatory, the reason *was* given by the Washington court—it being that the court was equally divided on the merits.

Petitioner complains that the Washington court is attempting to affirm his conviction without the concurrence of a majority of the court. This is in direct contradiction to the order in the instant case reported at 156 Wash. Dec. 334, 353 P.(2d) 429 (App. p. 64 of petition).

The above rule of affirmance is due process as followed by the United States Supreme Court and has always been equally applied in the state of Washington. Therefore, it presents no Federal question.

Petitioner's Right to an Impartial Grand Jury

There is no Federal Constitutional right to an impartial grand jury. *U.S. v. Knowles,* 147 F.Supp. 19, 20-21 (1957):

> "Challenges for bias, or for any cause other than lack of legal qualifications, are unknown as concerns grand jurors. No provision is made for peremptory challenges of grand jurors and no such challenges are permitted. Likewise no *voir dire* examination exists in respect to grand jurors. In other words, the status of a member of a grand jury may not be questioned except for lack of legal qualifications."

See, also, *Hale v. Henkel,* 201 U.S. 43, 26 S.Ct. 370, 50 L.ed. 652 (1906).

In fact, there is no Federal right to a grand jury at all in state proceedings. *Paterno v. Lyons,* 334 U.S. 314, 68 S.Ct. 1044, 92 L.ed. 1409 (1947); *Gaines v. Washington,* 277 U.S. 81, 48 S.Ct. 468, 72 L.ed. 793 (1927).

The only question presented here is whether, under the Constitution and statutes of the state of Washington, grand juries must be impartial and unbiased or, more specifically, whether there must be an affirmative determination as to whether they are impartial and unbiased.

It is nowhere contended that the Constitution of the state of Washington requires that a grand jury be impartial.

The pertinent Washington Constitutional provision in regard to grand juries is as follows: "Offenses heretofore required to be prosecuted by indictment may be prosecuted by information, or by indictment, *as shall be prescribed by law*" (emphasis supplied). Art. I, § 25, Washington State Constitution. Hence, grand jury proceedings in Washington are strictly statutory. The statutes governing grand juries in Washington are found in title 10.28 of the Revised Code of Washington. Section 10.28.030 of the Revised Code of Washington provides:

> "Challenges to individual grand jurors may be made by such person [in custody or held to answer for an offense] for reason of want of qualification to sit as such juror; and when, in the opinion of

> the court, a state of mind exists in the juror, such as would render him unable to act impartially and without prejudice."

Section 10.28.130 of the Revised Code of Washington provides:

> "If a member of a grand jury knows, or has reason to believe, that a public offense, triable within the county, has been committed, he must declare the same to his fellow jurors, who may thereupon investigate the same, if a majority so order."

In construing these statutes regulating grand juries, the Washington Supreme Court is equally divided on the question of whether the Washington legislature intends that grand jury members be without prejudice. See: *State v. Beck,* 155 Wash. Dec. 565, 570, 571, 608, 349 P.(2d) 387 (App. pp. 6-7, 44 of petition).

It is well settled that state court determinations of state law are binding on the United States Supreme Court. *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.ed. 398 (1945). The effect of the Washington court decision in the instant case is that the meaning of Washington statutes in regard to grand juries cannot be determined at this point. It would follow that this determination also is binding on the United States Supreme Court.

Since there is neither a Federal nor a Washington state Constitutional right to an impartial grand jury, and the Washington Supreme Court cannot determine what the Washington statutes prescribe in that regard, the Washington legislature and not the United States Supreme Court must answer that question.

The cases relied on by petitioner relate to situations where a member of a minority racial group was indicted by a grand jury from which members of that minority racial group were systematically excluded. Those cases have no application to the instant case. There is no minority racial group involved and no claim of exclusion. On the contrary, petitioner complains because a particular system of exclusion was not employed. As pointed out above, this is strictly a question of interpretation of state law and no Federal question is presented.

Motions for Continuance and Change of Venue

Petitioner complains that the Washington courts violated his rights under the Fourteenth Amendment to the Federal Constitution in ruling on his motions for continuance and for a change of venue. Petitioner does not allege that any of the applicable statutes or decisional law followed by the Washington courts are unconstitutional. Nor does he claim that the state courts failed to follow the applicable statutes. Petitioner does claim that the Washington court failed to follow its rule in *State v. Hillman,* 42 Wash. 615, 85 Pac. 63 (1906). In the opinion for affirmance in the instant case, distinguishing the *Hillman* case, the court said:

> "In the *Hillman* case we have allegations of fact, which, if not true, could have been controverted. Here we have only legal conclusions based upon information and belief, not capable of contravention." *State v. Beck,* 155 Wash. Dec. 565, 578, 349 P.(2d) 387 (1960), (App. p. 14 of petition).

The state requirements for continuance and change of venue are set forth in RCW 10.46.080 and RCW 10.25.070 respectively reproduced at page 4 of this brief. Petitioner completely failed to meet those requirements in the state proceedings. Specifically, petitioner did not present any evidence of prejudice as required by RCW 10.25.070 nor did he show the absence of any evidence expected to be obtained as required by RCW 10.46.080. Even so, the trial was continued for more than a month on the representation that additional time was needed to prepare the defense.

As petitioner recognizes, the purpose of a continuance or a change of venue under the circumstances in the instant case, is to secure to petitioner a fair and impartial jury. This is essentially a factual question under the applicable state laws which question was carefully considered and decided by both the trial and appellate courts of the state. As to the factual question of whether petitioner was tried by a fair and impartial jury in the instant case, in the opinion for affirmance at pp. 576-577 (App. pp. 12-13 of petition) it is said:

> "The appellant tries to apply the *ex post facto* test of the number on the jury panel who admitted prejudice. Appellant fails to make clear that all such prospective jurors were excused, and that thirteen jurors were selected and accepted by both sides within a very reasonable time. All of the fifty-five people who were examined on *voir dire* as prospective jurors had, of course, heard of the case either through television, radio, or the newspapers, but only nineteen were excused for prejudice."

* * * *

"The record of the *voir dire* examination of those called as prospective jurors negates any contention that a continuance was necessary to insure the appellant a fair trial, and justifies the statement of Judge Malcolm Douglas (on November 26, 1957), in denying the motion for a continuance:

"'. . . I am not at all impressed with your contention that Dave Beck, Sr., cannot have a fair trial in this community at this time. I believe arguments such as these do poor credit to the intelligence and fairness of the high-calibered jurors that we have in this community, and I am satisfied from observing the trial of cases for many years here and observing the type and quality of jurors that we have had . . . that it is possible to find 12 jurors who can give a defendant, including this defendant, just as fair a trial in December as one could be found to give him in May . . .' "

At this point it should be reiterated that there was no indication whatsoever by the Washington State Supreme Court of any disagreement on this point nor on any point except the meaning of Washington statutes in regard to grand juries.

Publicity is the only factual matter petitioner cites in support of his contention that a change of venue or a continuance was necessary to secure for him a fair trial. Petitioner was indicted on July 12, 1957, and his trial began on December 2, 1957. Petitioner cites a great deal of publicity occurring *prior* to his indictment (App. pp. 96-104 of petition). However, during the one hundred and forty-three days that intervened between the indictment and the trial, petitioner cites

only four instances when he received publicity in Seattle newspapers and four when his son received such publicity (App. pp. 104-105 of petition). This is not such publicity as would make impossible the selection of a fair and impartial jury. Nor is this embezzlement the type of crime that would inflame the community so as to prevent a fair trial. Certainly, what petitioner has alleged here does not even begin to show that the newspaper accounts aroused against him such prejudice in the community as to necessarily prevent a fair trial. See, *Stroble v. California,* 343 U.S. 181, 72 S.Ct. 599, 96 L.ed. 872 (1951). There is nothing in the petition to show that the factual determination of the state court was anything but correct, and even less to show that there is any Federal question involved. The cases cited by petitioner are for the most part aggravated cases of racial prejudice. There is no such element present here.

Beyond a doubt petitioner is a prominent national figure. Were he to be again tried on similar charges it cannot be doubted that he would receive equal publicity to that which he received during the one hundred and forty-three days preceding the trial in question. Certainly, any person as prominent as petitioner would receive such publicity in similar circumstances. No person should be granted immunity from criminal process by the fact that the various news media consider him newsworthy.

CONCLUSION

Since there is no Federal question involved, it is

respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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